IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Criminal Appeal No. 336 of 2003

With

Criminal Reference No. 1 of 2003

And

Criminal Appeal No. 59 of 2003

Date of decision: 16th August, 2004

For the approval of:

Hon'ble Chief Justice V.S. Sirpurkar.

Hon'ble Mr. Justice Irshad Hussain.

- Whether the order/judgment should be sent to the reporters for reporting?

- Whether the reporters be allowed to see the judgment?

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Crl. Appeal No. 336 of 2003

Naveen Chandra S/o Nanda Ballabh,
R/o Village Baira Majhara,
Patwari Circle Golena, Tehsil Kapkot,
District Bageshwar. ------Appellant

Versus

State of Uttaranchal -------Respondent

WITH

Crl. Reference No. 1 of 2003

State of Uttaranchal

Versus

Naveen Chandra S/o Nanda Ballabh,
R/o Village Baira Majhara,
Patwari Circle Golena, Tehsil Kapkot,
District Bageshwar. ------Accused

&

Crl. Appeal No. 59 of 2003

1. Smt. Kamla Devi W/o Sri Nanda Ballabh
2. Nanda Ballabh S/o Sri Prem Ballabh,
   R/o Village Baira Majhara,
   Patwari Circle Golena, Tehsil Kapkot,
   District Bageshwar. ------Appellants

Versus

State of Uttaranchal -------Respondent

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Ms. Pushpa Joshi / Mr. Nirmal Joshi, learned counsel for the appellants.
Mr. D.K. Sharma, learned Government Advocate for the State.

Coram: Hon'ble V.S. Sirpurkar, C.J.,
Hon'ble Irshad Hussain, J.
Date: 16th August, 2004

(Per Hon'ble the Chief Justice)

1. This judgment shall dispose of the criminal appeal No. 336 of 2003 along with criminal reference No. 1 of 2003 and also the criminal appeal No. 59 of 2003. In criminal appeal No. 336 of 2003 the original accused No. 3 Naveen Chandra is the appellant while his

parents, namely, Smt. Kamla Devi and Nanda Ballabh, original accused No. 2 & 1 respectively, are the appellants in criminal appeal No. 59 of 2003. Since, the original accused No. 3 Naveen Chandra has been sentenced to death, a reference No. 1 of 2003 has been referred to us. With the consent of the parties, we have heard all the three matters together. Since, the facts and evidence are common in all the three matters and since all the three accused were tried in a single trial, all the three matters are being disposed of by this common judgment. For the purpose of this judgment, we shall be referring to the accused appellants by their original accused numbers in the Sessions Trial.

2. All the three accused came to be tried by the Sessions Judge, Bageshwar in Session Trial No. 30 of 2001, wherein all the three accused were charged for an offence under section 302 read with section 34 Indian Penal Code on the allegation that on 2.06.2001, these three accused persons, in furtherance of their common intention, had committed murder of Ganesh Dutt S/o Prem Ballabh, Smt. Janki Devi W/o Ganesh Dutt and Sandeep S/o Ganesh Dutt. While the accused persons are the husband, wife and son, the deceased are also the husband, wife and son. Interestingly, original accused No. 1 Nanda Ballabh is the real brother of the deceased Ganesh Dutt. Shortly stated, the prosecution case was that the relationships between the two brothers, namely, original accused No. 1 Nanda Ballabh and the deceased Ganesh Dutt were strained on account of the family matters. They were all residents of the Village Baira Majhara, Tehsil Kapkot, District Bageshwar and their houses are almost adjoining to each other. On the fateful day i.e. on 2.06.2001, there was an altercation in between Nanda Ballabh & his family members on the one hand and Ganesh Dutt & his family members on the other during the day time in which, Ganesh Dutt received an injury to his head. It is then, the prosecution case that conciliation was to be arranged through a Panchayat at the instance of original accused No. 1 Nanda Ballabh, who had sought the intervention of Bhupal Dutt (PW2) and

others on the ground that his brother Ganesh Dutt was continuously troubling him and continuously hurling abuses. It seems that this was at 7'O Clock in the morning and thereafter, there was an alteration during the day time. Bhupal Dutt (PW2), therefore, went along with some others to the house of original accused No. 1 Nanda Ballabh, where 7 or 8 other persons were already present. This was at about 5'O clock in the evening. At the instance of original accused No. 1 Nanda Ballabh, Ganesh Dutt was called by Bhupal Dutt (PW2), one Bishan Dutt and Govind Ballabh. They found that Ganesh Dutt already had an injury on his head, yet he came along with them to the Courtyard in between the houses of original accused No. 1 Nanda Ballabh and the deceased Ganesh Dutt. On being asked as to what the dispute between the two brothers about, Ganesh Dutt allegedly lost his temper and started abusing the original accused No. 1 Nanda Ballabh. Therefore, the persons, who were there, took him back to his house. However, Ganesh Dutt, again, came back and held the hand of his sister-in-law i.e. original accused No. 2 Smt. Kamla Devi. After this, there was an altercation between original accused No. 1 Nanda Ballabh and Ganesh Dutt and they grappled with each other and Ganesh Dutt was knocked down by original accused No. 1 Nanda Ballabh. In the meantime, original accused No. 3 Naveen Chandra rushed and injured Ganesh Dutt on his head by a weapon called *"Khukri"*. The prosecution, further, alleged that Smt. Janki Devi W/o Ganesh Dutt, also came there praying to spare Ganesh Dutt, but she was also attacked by the original accused No. 3 Naveen Chandra on her face and head. Though the persons, present, requested original accused No. 3 Naveen Chandra to spare the to others, he ran up to the house of Ganesh Dutt, where Ganesh Dutt's son Sandeep was standing and injured Sandeep also. The other son of Ganesh Dutt, namely, Manish Kumar (PW3) took to his heels while the other son Mukesh hid himself. Ganesh Dutt died on the spot while his wife Smt. Janki Devi and son Sandeep were seriously injured. The Gram Pradhan was called and the injured were kept in the Varanda of Ganesh Dutt's house, but they also died during the same night.

3. A report came to be made of this incident by Pooran Chandra (PW1), who was at the relevant time, the Up-Pradhan (Vice Chairman) of the Village. This report was prepared on 2.06.2001 and was handed over, in which it was suggested that the accused persons had committed the murder of three deceased persons on account of the old rivalry. On this, the usual investigation was started after the case was registered against the accused persons for offence under section 302 I.P.C. The Investigation Officer Rahim Ahmed (PW6), who was the Patwari, has the police powers and he proceeded to the spot and conducted the usual investigation by conducting Panchnamas as also by inspecting the spot. He also sent the dead bodies for post mortem. Eventually, the accused persons came to be arrested. The Investigation Officer Rahim Ahmed (PW6) also recorded the statements of number of witnesses including the eye-witnesses and the charge-sheet was filed against the accused persons.

4. Before the Sessions Judge, accused abjured their guilt and claimed that they were falsely implicated. In support of the prosecution, as many as seven witnesses were examined. PW1 Pooran Chandra S/o Narottam was the author of the F.I.R. while PW2 Bhupal Dutt and PW3 Manish Kumar are the eye witnesses. PW4 Rama Devi W/o Pushakar is a formal witness while PW5 Dr. S.S. Toliya conducted the post mortem. PW6 Rahim Ahmed is the Investigation Officer while PW7 Pooran Chandra Karnataka is none else, but real younger brother of Nanda Ballabh, original accused No. 1, who seems to have been examined as a Court witness. It seems that though Pooran Chandra Karnataka (PW7) was not shown as a witness in the charge-sheet, he offered his evidence and the Sessions Judge also examined his as a Court witness. Thus, the whole case of the prosecution depended on the evidence of the eye-witnesses and accepting that evidence, the Sessions Judge has convicted the accused persons, under section 302 read with section 34 Indian Penal Code. Original accused No. 1 & 2 i.e. Nanda Ballabh and Smt. Kamla Devi

respectively have been awarded life imprisonment while the original accused No. 3 i.e. Naveen Chandra has been awarded the death sentence.

5. Ms. Pushpa Joshi, learned counsel appearing on behalf of the appellants – accused urges that the eye-witnesses account relied upon by the prosecution in this case, is unbelievable. She points out further that the possibility of the presence of Bhupal Dutt (PW2) on the spot was extremely scarce and that he has not given the correct and full account. As regards the second eye-witness i.e. Manish Kumar (PW3), learned counsel says that he is a child witness and was susceptible to being tutored by the elders in the family and that he was actually tutored by Pooran Chandra Karnataka (PW7), his uncle, with whom this witness stayed after the death of his parents. The further contention of the learned counsel for the appellants is that the eye-witness account by the two witnesses is contradictory, inter se, and that the Trial Court has completely erred in relying upon these two witnesses and convicting all the accused persons. As regards the involvement of the first two original accused, namely, Nanda Ballabh and Smt. Kamla Devi is concerned, the learned counsel says that there was absolutely no evidence against these two accused persons and the theory of these three accused persons, having any common intention to kill, is unsustainable, as even accepting the evidence of the prosecution in full, such meeting of mind, which was necessary, could not be inferred. It is, then, suggested that at least in so far as the first two original accused are concerned, there was not even an iota of evidence as to involve them and their conviction was wholly unsustainable. As regards, the original accused No. 3 Naveen Chandra, it is pointed out that even he seems to have been involved at the instance of Pooran Chandra Karnataka (PW7), the Court witness and that there was every reason to suggest that he was made a scapegoat in the whole affair. Learned counsel for the appellants very seriously urges and points out the various discrepancies in the investigation, which was done by a Patwari having police powers. She points out

that, firstly, the F.I.R. was belated and no copy thereof was sent to the concerned Magistrate. Secondly, she points out that though the prosecution tried to develop a theory of discovery of weapon, there was no proper evidence to support that theory. Thirdly, learned counsel urges that the death sentence awarded to the original accused No. 3 Naveen Chandra was wholly uncalled for as firstly, he was entitled to be acquitted and secondly, even if it was proved that he had taken part in the incident, it was liable to be believed that it was on account of certain provocation that he acted the way he did and his conviction should have been for an offence under Section 304-I I.P.C. and not for the offence under Section 302 I.P.C. Lastly, the learned counsel for the appellants argues that even if his conviction for offence under Section 302 was justified, the extreme sentence of death was wholly uncalled for considering the various circumstances and according to the learned counsel, this could never be termed as rarest of the rare case.

6. As against this, the public prosecutor Mr. D.K. Sharma urges that the evidence of the two eye-witnesses was not only natural, but it remained unchallenged in the cross-examination. He points out that Bhupal Dutt (PW2) was an uninterested witness and had graphically unravelled the prosecution story. He repels the criticism by the defence counsel that the available witnesses were not examined so as to unravel the whole prosecution story and urges that the two witnesses examined by the prosecution had sufficiently unravelled the whole story and their evidence remained unshakened. It is pointed out by the public prosecutor that the two witnesses corroborated each other and thus, the guilt of all the accused persons was brought home. The learned public prosecutor has argued that each accused had taken part in the said crime and it was not necessary for the application of Section 34 that there had to be a previous meeting of mind and that such common intention could develop on the spot also. According to the public prosecutor, that was precisely the case in the present trail. He further urges that though Manish Kumar (PW3) was a child

witness, he was sufficiently intelligent and his version was well corroborated by the circumstances on record and the evidence of Bhupal Dutt (PW2). Lastly, the public prosecutor urges that the present case could be described as rarest of rare case as Naveen Chandra, original accused No. 3, who is 22 years of age, had mercilessly committed three murders along with his own parents and had wiped out a family of husband, wife and son. He points out that Sandeep was barely 13 years of age and he had really nothing to do with the family rivalry and as such, the assault by Naveen Chandra on him was wholly uncalled for. It is, these reasons, that the public prosecutor Mr. D.K. Sharma supports the prosecution.

7. In this case, it cannot be disputed that all the three persons, who lost their lives, have suffered homicidal death. They were hale & hearty before the incident took place on 2.6.2001 and have suffered extensive injuries resulting in instantaneous death on the part of Ganesh Dutt while his wife Janki Devi and son Sandeep lost their lives shortly after the incident took place at about 5'O clock. Ganesh Dutt has suffered as many as 3 major injuries on his face and head. All the three injuries were incised injuries and were cumulatively sufficient to cause death. His wife Janki Devi suffered as many as 4 injuries on her head and face while son Sandeep also suffered 4 injures. The injuries, in case of all the three, were anti-mortem and have been testified to be sufficient to cause death. Dr. S.S. Toliya (PW5) has proved the post-mortem reports of all the three deceased persons and has certified the injuries in case of all the three deceased persons to be sufficient to cause death. Nothing much has come in the cross-examination of the Doctor excepting that the post mortem of one of the deceased was done at night in contravention with rules of Medical Council of India. No such rule was, however, pointed out before us. In fact, the defence did not meet the real challenge, the claim of the doctor that all the three injured persons had died in the same night due to injuries.

8. A faint effort was made by Ms. Pushpa Joshi, learned counsel for the appellants – accused to suggest that the injuries did not co-relate to the weapon allegedly used by original accused No. 3 Naveen Chandra as it was with a weapon called *"Bariath"* that the injuries were caused and if that was so, the injuries should have been slightly round according to the shape of *"Bariath"*.

9. We do not agree with this argument of the learned counsel for the appellants is as much as it has come, very specifically, in the evidence of both the eye-witnesses that it was with a weapon called *"khukri"* that the injuries were caused and there is no serious challenge to the evidence of Dr. S.S. Toliya (PW5) that the injuries are capable of being caused by a *"khukri"*.

10. In the cross-examination, the doctor was merely asked the rules regarding the post mortem not being conducted during night. He also admitted that the weapons, like *Kukri, Darati, Bariath* and *Talwar* were different kinds of weapons, having different kind of design and length, etc. He insisted that all the injuries were straight and were not curved injuries so as to completely give a go bye to the defence theory that it was not *Khukri,* but *Bariath,* which was weapon of murder. The doctor has very specifically stated in his evidence that a portion of *Khukri* is straight and not curved. That would simply establish that the injuries on all the three bodies which were straight and not curved, were caused by *Khukri*. Beyond putting some stray suggestions, the defence has not been able to draw any support from the evidence of the doctor and it was clear that all the three deceased persons died due to the injuries inflicted on their body by a sharp and cutting weapon like *Khukri*. We cannot, therefore, accept the defence suggestion that the medical evidence in this case does not support the case of the eyewitness P.W.2 Bhupal Datt and P.W.3 Manish Kumar. We would now take up the appreciation of the evidence of these witnesses. The Session Judge has relied upon these two witnesses. In his evidence, P.W.2 Bhupal Datt had given a graphic account practically of the

incident, which took place practically whole day i.e. 2.6.2001. We will not repeat. However, he has specifically stated about accused Nanda Ballabh coming to his house at 7 O' clock and complaining about the activities of deceased Ganesh Datt. He has also referred to the fact that when he went to Nanda Ballabh's house, there were certain other villagers available including Bishan Datt, etc. He had gone to the house of accused Nanda Ballabh at about 5 O' clock. He then specifically deposed that he, Bishan Datt and Govind Ballabh had gone to call Ganesh Datt at the instance of accused Nanda Ballabh. He also referred to the injuries suffered by Ganesh Datt to his head. It is significant to note that in the first information report itself, the name of Bhupal Datt is to be found. In the F.I.R., there is a specific reference to a *Panchayat,* which had met to solve the dispute. It has come in the F.I.R. that in that *Panchayat,* Bishan Datt, Govind Ballabh and Bhola Datt were present and since there was a fight during the said *Panchayat,* the accused Nanda Ballabh, his wife accused Kamla Devi and his son accused Naveen Chandra had injured and murdered Ganesh Datt, his wife Janaki Devi and son Sandeep. Therefore, we find truth in the evidence of this witness. This witness then very specifically asserted that after Ganesh Datt's arrival at the spot, when he asked as to what was the dispute, he lost temper and, therefore, he was taken back to his house by the witness and some others. He then asserts that Ganesh Datt was locked in the house, he freed himself and came at the spot and held the hand of accused Nanda Ballabh's wife-accused Kamla Devi. The witness went on to say that accused Nanda Ballabh confronted him, and then there was a grappling between accused Nanda Ballabh and Ganesh Datt, wherein Nanda Ballbh felled Ganesh Datt on the ground and that Ganesh Datt had fallen on the ground and over him was accused Nanda Ballabh and at that time accused Naveen Chandra rushed there and hit Ganesh Datt at his temple with *Khukri.* This witness undoubtedly referred to only one blow and considering the number of injuries on Ganesh Datt's person, the defence tried to argue that the account of the witness regarding this assault was incomplete. It was pointed out by

the learned counsel that there were as many as about three lacerated wounds on the head and face of Ganesh Datt. From that, learned counsel for the defence wants us to disbelieve Bhupal Datt. That was not possible. It may be that Bhupal Datt described only one blow, but is was altogether that Naveen Chandra, who was armed with *Khukri*, had his Ganesh Datt atleast 2-3 times. Merely because the P.W.2 witness Bhupal Datt described only one blow, it is not sufficient to discard his testimony altogether. It is as if the witness Bhupal Datt has stated that there was only one blow given by Naveen Chandra to the deceased Ganesh Datt.

11. The witness then further said that wife of Ganesh Datt was coming and Naveen Chandra hit her with the same *Khukri* on her face and nose. On being injured Janaki Devi fell on the ground. This was also very natural evidence. When we compare the injuries of Ganesh Datt and Janaki Devi, they correspond firstly to the attack of *Khukri* and secondly to the account given by the witness regarding the parts of the body on which Naveen Chandra had attacked with the aid of *Khukri*. This witness then spoke about the assault by Naveen Chandra on deceased Sandeep, who was standing in front of the house of Ganesh Datt. He says that Sandeep Kumar after the assault of accused Naveen Chandra entered the house of Ganesh Datt and then came out after about two minutes. He has also given very specific account regarding the other two sons of deceased Ganesh Datt, they being Manish and Mukesh. He specifically says that one of them took to his heals while the other hid himself under the stairs. The witness then goes on to say that Ganesh Datt, died on the spot and other two i.e. Janaki Devi and Sandeep were seriously injured and died at night. This witness was closely cross-examined. However, barring the few insignificant omissions, the witness was not shaken at all. The omissions are regarding his visit to accused Nanda Ballabh at 7 O'clock and Nanda Ballabh's complaint against Ganesh Datt that he was not behaving properly. A further omission is regarding Nanda Ballabh's refusal to go to Ganesh Datt's house for calling him. Then

there is only one major omission i.e. about Ganesh Datt's coming on the spot and holding the hand of accused Nanda Ballabh's wife accused Kamla Devi, but we will not attach much importance to that fact because it is obvious from the evidence of this witness that Ganesh Datt did actually come on the spot and that thereafter there was physical altercation between accused Nanda Ballabh and deceased Ganesh Datt. Some support was tried to be taken by the defence from a stray sentence that *"Maine Nanda Ballabh Wa Uski Patni Thatha Uski Larkiyon Ko Ganesh Datt Ke Sath Marpit Karte Nahi Dekha. Ukta Ghatna Mujhe Mukesh Ne Batai Thi"*. I had not seen Nanda Ballabh and his wife and his daughter fighting with Ganesh Datt and that incident was told to him by Mukesh. From this learned counsel for the defence Mrs. Pushpa Devi wanted us to discard the whole evidence of Bhupal Datt. We cannot accept the defence suggestion for the simple reason that this obviously pertained to the earlier incident during the day, during which Ganesh Datt had suffered an injury to his head. Barring giving suggestions that this witness was not present on 2nd June and barring suggestion, a futile suggestion, regarding some non-existing enmity on account of water dispute, the witness could not be shaken so far as his main core of evidence to the effect that, to begin with, there was physical altercation of accused Nanda Ballabh with deceased Ganesh Datt and during that altercation Naveen Chandra rushed to the spot and hit Nanda Ballabh with *Khukri* and thereafter injured the wife of Nanda Ballabh, Kamla Devi, wife of Ganesh Datt, Janaki Devi and thereafter assaulted son of Ganesh Datt, namely, Sandeep and all the three were actually injured at the hand of Naveen Chandra.

12. Very significantly, this witness also refuted the suggestion made to him that at the time of this incident Manish was not there and he had gone to purchase sugar at the spot of Society, which is about half furlong away from the house of accused Nanda Ballabh. Very significantly again in his cross-examination, he was asked about Ganesh Datt's holding wrist of accused Kamla Devi. However, he

asserted that it was a fact. Learned counsel for the defence very vehemently assailed the evidence of this witness. However, we do not think that this witness could be disbelieved atleast in so far as the main story of assault by Naveen Chandra as against Ganesh Datt, Smt. Janaki Devi and Sandeep. There is really no cross-examination worth the name in so far as that incident is concerned. Significantly enough, this witness has very categorically asserted in his cross-examination that he could not tell as to which accused had hit whom and where. There is undisputedly some confusion by the witness in so far as the commencement of the incident is concerned, where the witness had stated that he had locked Ganesh Datt in his house. However, that by itself will not be enough to discard the whole evidence. After all we cannot forget the fact that this witness has very clearly mentioned in the F.I.R. and it was the prosecution case throughout that there was a *Panchayat,* held at the instance of this accused Nanda Ballabh. The evidence of this witness is also corroborated by the fact that Ganesh Datt's body was found in between the two houses, where the body was actually thrown by Nanda Ballabh and other accused. The learned counsel criticised the evidence of this witness that this witness did not do anything to save Ganesh Datt or his wife Janaki Devi and atleast Sandeep. When, we see the cross-examination, the witness has asserted that he had shouted *"Mat Karo, Mat Karo",* don't do, don't do. This would clearly suggest that the witness was not a mute spectator. After all his intervention was sought for by accused Nanda Ballabh himself. We, therefore, accept the evidence of this witness in so far as it corroborates the main incident. The presence of this witness was natural. It was corroborated further by his mention in the F.I.R. and corroboration is also to be found in the evidence of P.W.3 Manish. This brings us to the evidence of P.W.3 Manish.

14. Manish is the son of Ganesh Datt. At the time when the incident took place, he was barely 9 years old. He was tested by the trial Court and the trial Court was convince that he was capable of understanding the importance of truth. He in his evidence has referred

to the incident, which took place in the afternoon, where his father was injured. He then referred to Bhola Datt, Bishan Datt, Khyali Datt and Bhupal Datt, P.W.2, who had called his father for *Panchayat.* He then referred to the first incident of grappling between accused Nanda Ballabh and his father and then deposed that Naveen Chandra hit his father with a *Khukri.* He has exaggerated a little thereafter and deposed that Kamla Devi took a huge stone and hit on the head of Ganesh Datt. He then also referred to the fact that accused Nanda Ballabh and accused Naveen Chandra threw the body of Ganesh Datt in the filed of Bache Singh. Thereafter he referred to Janaki Devi appealing the accused persons not to assault Ganesh Datt. He then asserted that accused Naveen Chandra and Kamla Devi came there and Kamla Devi allegedly said that even she should be cut. Thereafter, he referred to his elder brother Sandeep and deposed that he was appealing the accused not to hit, on which Kamla Devi allegedly stated that even he should be cut. His brother was fleeing from the spot, but lost his balance. Then Naveen Chandra cut hands of his brother. He also asserted that his mother, namely, Janaki Devi was also assaulted by Naveen Chandra by *Khukri* and his mother was rising and falling. He then referred to Hema and Munni, who are daughter of Nanda Ballabh and deposed that they asked for *Khukri* from Naveen Chandra and that they were saying that they would kill Manish and Mukesh. He then asserted that Naveen Chandra went inside and took away the ornaments from the house. He asserted that he was very much present when his father was assaulted by Naveen Chandra. He also asserted that Kamla Devi had a stone and a Darati (sickle); Hema had a sickle and Munni and Chandu had stone and sticks. He then identified *Khukri,* but said that he had seen it for the first time in the Court room and had never seen earlier. He then turned around and said that when Naveen Chandra had hit his mother, his father and his elder brother Sandeep, at that time the same *Khukri* was used by him. He identified all the accused persons. He was given a suggestion that *Khukri* was brought by his father from his house. He denied the suggestion. He accepted his elder uncle Pooran

Chandra was Patwari and that he was living with Pooran Chandra and he also refuted the suggestion that he was deposing as per the say of his elder uncle. It was tied to be suggested in his cross examination that he had gone to Khyali Datt's house and the learned defence counsel very vehemently argued that if he had gone to Khyali Datt's house, there was no question of his being able to witness this incident. It is, however, very important to note that he asserted that it was at about 6 O'clock that he had gone to Khyali Datt's house. It was further tried to be suggested by Mrs. Pushpa Joshi that he had admitted that he had gone somewhere (*Upper Gaon)* when his father, mother and brother were killed and that when people said that your father and mother were killed, he came back to his house. We have seen the admission ourselves. We are quite convinced that it cannot be read as admission of the fact that he was not there, when the murderous incident took place. It is no doubt true that the witness has exaggerated little in giving specific role to Kamla Devi of assaulting Ganesh Datt with stone. It is also no doubt true that he had attributed some role to the daughters of Nanda Ballabh. However, shorn of these exaggerations, the witness has undisputedly, stuck to his story in so far as the main incident is concerned. He could not be shaken in the cross-examination. It may be that the witness had gone to Khyali Datt's house after seeing the ghastly incident and might have been informed by the people that his parents were killed and thereafter he might have come back. They really appear to be the assertion on the part of the witness. There are some omissions, which were highlighted by the defence counsel before us. The first such omission was about *Panchayat* being held by Bhola Datt, Bishan Datt, Bhupal Datt and other villagers. There is omission in respect of the role played by Kamla Devi about her utterances. He also accepted that he had not spoken about Kamla Devi hitting Ganesh Datt with a stone. There is omission even about the utterances by Kamla Devi inciting Naveen Chandra to cut himself. We are, however, convinced that in so far as the main incident is concerned, the witness has rightly described the criminal was committed by Naveen Chandra vis-à-vis

Ganesh Datt, Kamla Devi and Sandeep. His version to this effect is completely corroborated by Bhupal Datt, who was independent witness. The learned counsel very vehemently argued that he was firstly an interested witness and secondly, he was child witness, who could have been easily influenced by his uncle Pooran Chandra. We are not convince that this witness was capable of being tutored and indeed, his version in so far as it pertains to the assault on three deceased persons is concerned, does not appear to be tutored. It is no doubt true that the witness has gone ahead and has tried to depose something against his cousin sister i.e. Ganesh Datt's daughter. He had also tried to add some unnecessary details in attributing the utterances to his aunt Kamla Devi. However, that by itself will not be sufficient to discard his whole testimony. We find that his story regarding the assault by Naveen Chandra stood unchallenged. Some unguided answers were tried to be highlighted by the learned counsel. We cannot forget the fact that this witness had seen three members of his family including parents being slaughtered. He was barely 9 years of age. Yet he was sure and said what he had seen and deposed correctly about the main incident. It is always the task of the High Court to appreciate the evidence of the child witness keeping in mind that he is susceptible to tutoring, as also he is interested witness. Keeping that caution in our mind we have come to the conclusion that firstly this witness would certainly be interested in seeing that the real assailants should not get away. Secondly, in so far as his susceptibility to the tutoring is concerned, we have taken a cautious view that his exaggerations, which might be the result of tutoring, can be ignored. However, the contention could not be countenanced that he was a set up witness and that his complete story was a figment of imagination. We are quite convinced that he was a truthful witness in so far as the main incident is concerned. He has repeatedly asserted that it was not his elder uncle Pooran Chandra, who had tutored him to deposed in the Court. Very significantly, there is practically no cross examination of this witness in so far as the main incident is concerned.

15. We are, therefore, holding that the evidence of this witness was rightly accepted by the trial Court in so far as the main incident was concerned. We, however, hasten to add that it will be our task to see as to what is the role played by each accused on the basis of the evidence of the main two eye witnesses, namely, P.W.2 Bhupal Datt and P.W.3 Manish.

16. When we see the evidence of the doctor P.W.5 Dr. S.S. Tolia and the injuries, the evidence of this witness stands corroborated. The witness rightly said Ganesh Datt was hit on his head and Sandeep was hit by *Khukri* on his hands. It is significant to note that Sandeep had the injuries on his fore-arm as also on the right thumb and Ganesh Datt also had injuries on his head. This is an additional factor in support of this witness. We, therefore, accept the evidence of this witness in so far as it pertains to the main incident of assault against the three deceased persons by Naveen Chandra. In fact the evidence of these two eye witnesses, if accepted, would be enough to accept the prosecution story that the three deceased persons lost their lives in the incident. We would, however, consider the role played by each accused in the latter part of this judgment.

17. Learned counsel tried to argue that Pooran Chandra, who was examined as a Court witness was not present, who set up the whole prosecution story. This witness undoubtedly is the real younger brother of accused Nanda Ballabh. It seems that he on his own offered to depose. We are really not impressed by this witness or even the argument that it was he who was perpetrator of the prosecution story. The learned Sessions Judge would have done well in avoiding bringing on record all the inadmissible portions of his evidence. All his evidence is nothing, but what was told to him by various persons like Ishwari Datt, Govind Ballabh, Bishan Datt, etc. Much time was wasted by the Sessions Judge in bringing on record what he actually heard from those witnesses. Obviously, all that

evidence was hear-say and could not have been allowed to go on record. We are also not impressed by the defence contention that it was he, who managed to tilt the first information report so as to suit the prosecution story or that he played a major part in setting up Manish as a witness. In our opinion, the whole of his evidence can be simply ignored and we ignore the same. It is, therefore, obvious that the two witnesses, who have been examined as the eye witnesses can be relied upon by the prosecution in so far as their story of assault against the deceased persons is concerned.

18. However, it cannot be said that the three accused persons had a common intention to assault the deceased persons or any of them. It has come in the evidence of Bhupal Datt that to being with, deceased Ganesh Datt alone came out and there was physical altercation between him and the accused Nanda Ballabh in which Nanda Ballabh felled down Ganesh Datt. Bhupal Datt then asserted that even the wife of Ganesh Datt was there and that subsequent version appears to be a reliable version because if there was already a fight going on between her husband and Nanda Ballabh, she was not expected to keep quiet. This witness, however, asserts in our opinion that Naveen Chandra then rushed. It is significant to note that though Nanda Ballabh and Janaki Devi were stated to be present at the spot, there is no reference to Naveen Chandra's presence at that time. It is, therefore, obvious that Naveen Chandra probably saw the incident of physical altercation between his father and uncle, and rushed with a *Khukri* in his hand. This completely rules out any previous meeting of mind in between the accused and it only appears to be the individual doing on the part of accused Naveen Chandra. The version of Bhupal Datt that Naveen Chandra again was holding *Khukri* is supported by P.W.3 Manish, who also firstly described the physical altercation between accused Nanda Ballabh and the deceased Ganesh Datt and then asserted that in the meantime, Naveen Chandra rushed with *Khukri* and hit Ganesh Datt on his head. This suggests that though Nanda Ballabh and his wife Kamla Devi were on the spot, it

was Ganesh Datt, who came and then the physical altercation between him and Nanda Ballabh started. We are also doubtful about the Ganesh Datt holding the hand of the wife of Nanda Ballabh, accused Kamla Devi. It may be that accused Ganesh Datt might have rushed towards both of them. However, it does not appear that there was even a physical altercation between the two and during this altercation Naveen Chandra rushed and assaulted Ganesh Datt with *Khukri*. We are also not prepared to believed that Kamla Devi had used a stone, that was obviously an exaggeration introduced by Manish. To that extent, his testimony must be discarded. Bhupal Datt has not supported Manish in that behalf and, therefore, it will be risky to attribute Kamla Devi that she used a stone against Ganesh Datt. There was in fact no necessity to do so as he was already severely assaulted by Naveen Chandra. It is obvious that the whole incident must have taken place during a very narrow time frame. After assaulting Ganesh Datt, Naveen Chandra assaulted Janaki Devi on her face. This version is also corroborated by the medical evidence because Janki Devi had injuries on her face. It is thereafter that he rushed towards Sandeep, who was standing in front of his own house. This alone appears to be proved part of the story. Therefore, there is no scope to hold that there was any meeting of mind. The common intention can undoubtedly be developed on the spot or at the spur of moment. This was certainly not a case where such common intention had actually developed. Beyond saying that Nanda Ballabh was grappling with Ganesh Datt, the two witnesses have not attributed even abuses to Nanda Ballabh. Same is the story as regards Kamla Devi. Though Manish attributed some utterances to Kamla Devi inciting Naveen Chandra to assault Janaki Devi and Sandeep, we are convinced that that part of the evidence of Manish cannot be accepted, the main reason being, that Bhupal Datt had not attributed any such utterances to Kamla Devi. Bhupal Datt had also not attributed any act to Kamla Devi regarding her assault by stone on Ganesh Datt, though P.W.3 Manish Kumar tried to say that. We are not prepared to accept that part of the testimony of Manish also. Thus, the theory of common intention

being there, being developed at the spot has to be discarded. Once that is done, there will be no question of convicting the accused Nanda Ballabh or accused Kamla Devi with the aid of secition 34 of the Indian Penal Code. Thus, no act could be attributed to Nanda Ballabh and Kamla Devi, collectively or individually, though their son suddenly rushed with *Khukri* and started the murderous assault against the three deceased persons. There is simply no evidence to support such theory. Once applicability of section 34 I.P.C. goes, that would leave Naveen Chandra alone in the fray. He is the sole author of all the injuries. He was not the part of earlier altercation for which the accused have been charged. He probably seeing his father grappling with Ganesh Datt, rushed with a *Khukri* and had assaulted all the three, resulting in the death of all the three, namely, Ganesh Datt, Janki Devi and Sandeep.

19. Learned public Prosecutor, however, tried to get over this situation by suggesting that the evidence of P.W.3 Manish Kumar was by itself enough to suggest that Kamla Devi and Nanda Ballabh had actually taken part in the incident with active mind and thus they can be convicted and were rightly convicted by the trial Court. Learned Public Prosecutor also tried to suggest that the utterances on the part of Kamla Devi would certainly depict that intention. We have already given our reasons as above to discard this argument altogether.

20. The learned defence counsel in so far accused Naveen Chandra was concerned, asserted that the so called murder weapon i.e. *Khukri* was not identified by either of the witnesses, namely, Bhupal Datt or Manish Kumar. The learned counsel also urges that non-identification of murder weapon would render the whole prosecution story unreliable. She also suggested that it was not certain as to whether the murder was committed by a *Khukri*, which was before the Court or by *Bariath*. We consider it unnecessary to go into that aspect. We are convinced that the murderous assault was done by Naveen Chandra by a sharp weapon. The injuries on the part of the

deceased persons would confirm that they were caused by sharp cutting weapon. We have already discussed the evidence of P.W.5 Dr. S. S. Tolia, who had confirmed that vital injuries were caused on the deceased by sharp and cutting weapon and that in this case all the three deceased persons had died to those, injuries.

21. Once this part of the evidence of P.W.2 Bhupal Datt and P.W.3 Manish is accepted, there would be really no question of further probe into the murder weapon. The said weapon was recovered from behind the house of accused alongwith one other weapon. The weapon was not sent to the Chemical analyser. In his evidence, P.W.6 Rahim Ahmad, Investigating Officer has no where deposed about the sending these articles to the chemical analyser, nor there is any report found of the Chemical Examiner on the record.

22. We are not at all satisfied and happy with the standards of investigation and after all nothing much even could be expected since this investigation has been conducted by the Patwari. It is really unfortunate that even in this 21st Century, the investigations should be conducted in the hilly areas by the revenue staff. It is really further unfortunate that even now the people in the hilly areas should not have the police stations or the trained police personnel to investigate into the ghastly crimes. These revenue personnel seem to have been empowered u/s 6 of the Scheduled Districts Act, 1874 by the Lieutenant Governor of the then United Provinces. The rules seems to have been framed on 07.03.1916 vide Notification No. 494 VIII-418x –6. The rules suggest that *Peshkar, Kanungos,* Superintendent of *Patwaris, Patwaris, Thokdars, Pradhan* and village head man, shall perform the police duties specified in the rules. Out of them *Peshkars, Kanungoes,* Superintendent of *Patwaris* and *Patwaris* were authorised to perform the duties vested in the officers incharge of the police stations by the Criminal Procedure Code, 1898. No wonder that the standard of investigation is hopelessly low. It is hoped that adequate police force is created in the hilly areas, because in our own

opinion, persons living in the hilly areas will in fact be requiring equal, if not, any more protection. It has to be realised that time has changed and there is need now that the investigations are conducted by duly trained police officers, who are aware of the modern techniques of investigation. Merely because these are the hilly areas could not mean that even in this 21st century, the investigation into ghastly and serious crimes could be left with the village police.

23. There were undisputedly some defects in the investigation and much more could have been done in this case. However, even with all the negative factors, we are convinced, that the two eye witnesses were truthful to the extent that we have shown them to be.

24. This brings us to the question of individual liability of the accused persons. We have already shown that accused Nanda Ballabh and accused Kamla Devi cannot be convicted as in reality they had not taken part in committing the murders of the three deceased persons. They would be, therefore, entitled to be acquitted. It is, however, proved beyond reasonable doubt that the accused Naveen Chandra was one, who used the *Khukari* and committed the assault against Ganesh Datt, Janki Devi and Sandeep.

25. A further question is as to the nature of the offence committed by accused Naveen Chandra. The learned counsel for the defence urged that he had committed ghastly act because of grave and sudden provocation by Ganesh Datt, who had held the hand of his mother and lateron who was grappling with his father. We do not find this to be a provocation, much less than grave and sudden provocation. We have already shown that the theory of Ganesh Datt holding the hand of Kamla Devi, cannot stand to scrutiny, that was obviously an exaggeration. Even if the said incident took place in the manner Manish described the same, in our opinion, it cannot be grave and sudden provocation so as to scale down the offence of murder. The situation did not justify Naveen Chandra's taking *Khukri* out of his

house and rushing, and then assaulting three deceased persons in a row by causing their murder. We are, therefore, not at all impressed by the arguments of the learned defence counsel that the act or acts came as a reaction to a grave and sudden provocation received by accused Naveen Chandra. Again, it cannot be said that there was any provocation to accused Naveen Chandra at all. In fact Naveen Chandndra probably saw his father grappling with Ganesh Datt and rushed with a *Khukri.* It must be noted here that nobody used the weapon except accused Naveen Chandra. Under such circumstances, we reject the defence plea. Once that is done, the only offence that could be proved against accused Naveen Chandra would be under section 302, I.P.C.

26. That would bring us to the question of sentence to accused Naveen Chandra. There can be no doubt that he has committed a heinous crime in committing the murder of the three persons at a time. The learned Public Prosecutor, therefore, strongly supported the death sentence awarded by the Sessions Judge. The Sessions Judge has, however, dealt with the matter of sentence in a very slip-shod manner. While awarding the death sentence all the care has to be taken to first establish that it is the rarest of rare case. We are not at all satisfied with the finding of the Sessions Judge while awarding the death sentence. The whole approach of the Sessions Judge has been extremely casual. There are hardly any reasons to be found in the impugned judgment. The learned defence counsel pointed out that the accused was young person of about 22 years of age, when he committed the crime. Her further contention is that there is no criminal record of Naveen Chandra, nor the accused has shown any depravity of mind. According to learned counsel, it is merely because accused Naveen Chandra saw his parents being assaulted by Ganesh Datt that he took the law in his own hands and in a fancy of moment, committed the three murders. The learned counsel firstly urges that we should not be alarmed by the number of deaths, which took place in this case and hold this to be the rarest of rare case. It will be,

therefore, our task to test whether this case can be raised to the high pedestal of rarest of rare case. In our opinion, this case cannot be held to be the rarest of rare case by any standards. Supreme Court on more than one occasion has cautioned the Courts below from taking the harsh attitude. We must point out that that this was not a case out of any greed for the property. Undoubtedly, there was assertion on the part of the P.W.3 Manish Kumar that immediately after the incident in question Naveen Chandra and Nanda Ballabh entered the house of Ganesh Datt and took away some ornaments. We find no reason to believe this part of the prosecution story, and we will have to ignore that part of the story as an aberration. We cannot forget that P.W.2 Bhupal Datt, on whose testimony we have relied upon, has not in any manner attributed looting to any of the accused. We have already pointed out that P.W.3 Manish Kumar has given two exaggerations, which could be owing to his tender age. After all, the boy had seen his parents and his elder brother being seriously injured resulting in the death, almost instantaneous death. We cannot also forget the fact that this was a family feud. The prosecution has utterly failed to bring on record the bone of contention in between the families of deceased Ganesh Datt and accused Nanda Ballabh. It is really unfortunate that there could have been a bickering and a feud in between the two brothers. Such situation is not unusual in the Indian rural scenario. Perhaps the incident was as a result of that long standing feud, which had not yet turned into the physical altercation. There is no evidence brought by the prosecution that there was any physical altercation between the two families in the past. Thus, it is obvious that seeing Ganesh Datt grappling with Nanda Ballabh on that particular day, and seeing the possibility of assault on his mother, Naveen Chandra simply rushed there with *Khukri* and assaulted Ganesh Datt, Smt. Janki Devi and thereafter Sandeep. Under those circumstances, could it be justified. We should not be misunderstood to suggest that accused Naveen Chandra had acted in self-defence to save his father because it has come in the evidence of the witnesses that Ganesh Datt was unarmed and there was physical grappling going

on between Nanda Ballabh and Ganesh Datt. Naveen Chandra, therefore, rushed, seeing apprehension of any dangerous injury or death to his father. However, he has undoubtedly reacted. It cannot be reacted to the extent of grappling. Again during the whole day, it was accused Nanda Ballabh, who was constantly complaining that Ganesh Datt was troubling his family by hurling abuses. The act on the part of Naveen Chandra could have been an explosion for which the grappling between his father and Ganesh Datt acted as an ignition switch. We, therefore, do not see this to be the rarest of the rare case. Undoubtedly, the injuries caused by Naveen Chandra were serious. However, Naveen Chandra has not shown any depravity of his mind by inflicting severe injuries. Again there is no doubt that Janki Devi was unarmed and so was Sandeep. However, if the whole family had gathered there, Naveen might h ave lost his balance and went on assaulting the three deceased persons one by one. We, therefore, do not see this as the rarest of rate case. The apex Court in the reported decision Bachhitar Singh and another Vs. State of Punjab reported in 2002 (7) Supreme 182, has refused to confirm the death sentence where in a family feud eight persons were murdered. It is not shown that Naveen Chandra was and could be viewed as a menace to the society or was likely to be continuous threat to the village in general. He is a young boy and there is no reason to believe that he cannot be reformed and rehabilitated. In the reported decision, the Supreme Court had taken the same view. The Supreme Court had also taken into account the fact that there was no evidence on record, which could suggest the misconduct on the part of the accused in the past. The same is the situation here. Accused Naveen Chandra has not been shown to be of any criminal temperament. We are, therefore, of the firm opinion that this cannot be a case where the death sentence could have been awarded. The death sentence would have to be set side. There were other rulings cited by the learned counsel for the defence, but in view of the finding that we have given, we find it unnecessary to refer to those cases.

27. In the result, Criminal Appeal No. 59 of 2003 is allowed and accused Smt. Kamla Devi and accused Nanda Ballabh are acquitted. Both of them are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender. Fine, if already paid, shall be refunded to them.

28. Criminal Appeal No. 336 of 2003 filed by accused Naveen Chandra is partly allowed. His death sentence is set aside and is converted to life imprisonment. He is already in jail and shall serve out the sentence awarded to him.

29. Criminal Reference no. 1 of 2003 is answered against the State holding that the death sentence awarded by the Sessions Judge was not justified.

(Irshad Hussain, J.) **(V.S. Sirpurkar, C.J.)**

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